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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

THOMAS SILKOWSKI, on behalf of himself and all others similarly situated, Plaintiff, vs. APPLE INC., a CALIFORNIA corporation, and DOES 1- 50, inclusive, Defendants.	Case No. 3:16-cv-02338-JD Case No. 3:16-cv-03017-JD CLASS ACTION **PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS COMPLAINTS** Date: September 29, 2016 Time: 10:00 AM Courtroom: 11, 19th Floor Judge: Hon. James Donato
COLLEEN PALOMINO and IRENE MCDONNELL, on behalf of himself and all others similarly situated, Plaintiffs, vs. APPLE INC., a CALIFORNIA corporation, and DOES 1- 50, inclusive, Defendants.	

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I. INTRODUCTION

At issue in this case is a contract (the "Terms and Conditions") Apple, Inc. forced Plaintiffs, and the purported Class members, to agree to before accessing certain services and stores Defendant owns and operates. The Terms and Conditions contain various provisions that broadly disclaim all liability for Defendant's intentional, reckless, negligent, fraudulent, unfair, deceptive, and other unlawful conduct. Defendant did not negotiate with Plaintiffs or any of the members of the Class in creating the Terms and Conditions. Instead, Defendant unilaterally chose to subject Plaintiffs and the Class to the broad and unbounded liability waivers contained in the Terms and Conditions.

The Terms and Conditions' broad and unbounded liability waivers violate New Jersey's Truth-in-Consumer Contract, Warranty and Notice Act ("TCCWNA"), N.J.S.A. § 56:12-14, *et seq*. The TCCWNA was enacted because "far too many consumer contracts…contain provisions which clearly violate the rights of consumers," and because the "very inclusion" of such terms in a contract "deceives…consumer[s] into thinking that [such terms] are enforceable." SC ¶ 15[1]; PC ¶ 14.[2] The TCCWNA grants consumers the individual right to be presented with contracts that exclude terms identified as illegal under the TCCWNA. SC ¶¶ 16-19, 22; PC ¶¶ 15-18, 21. Defendant has injured Plaintiffs and the Class by presenting them with contracts that include illegal terms. This injury entitles Plaintiff and the Class to monetary and equitable relief under the TCCWNA.

Defendant argues that Plaintiffs lack standing without allegations of monetary harm, property loss, or personal injury, that the Terms and Conditions do not contain illegal terms, and that the application of the TCCWNA is unconstitutional. These arguments are meritless: Plaintiffs have standing because Defendant offered them illegal contracts; the Terms and Conditions contain illegal terms because their provisions disclaim all liability for Defendant; and the TCCWNA is constitutional because it is a benign consumer protection law that does not negatively affect interstate commerce. For these reasons, the Court should reject Defendant's motion in full.

II. STATEMENT OF RELEVANT FACTS

Defendant operates the iTunes Store, the Mac App Store, the App Store, the App Store for Apple

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[1] SC ¶ _, and ¶¶ _, shall refer to the Plaintiff Thomas Silkowski's Complaint.

[2] PC ¶ _, and ¶¶ _, shall refer to Plaintiff Colleen Palomino and Irene McDonnell's Complaint.

TV, the iBooks Store and Apple Music (collectively the "Stores"), which allow consumers to download, license and purchase products and content. SC ¶ 30; PC ¶ 29. In order to access the Stores, consumers are presented with, and must agree to, the Terms and Conditions. SC ¶ 31; PC ¶ 30. Plaintiff and the Class members each were presented, the Terms and Conditions and entered into the agreement with Defendant. SC ¶¶ 32-33; PC ¶¶ 31-33. According to Defendant, it "presents uniform Terms and Conditions to consumers across the United States." Def. Br. at 2.

The Terms and Conditions contain various provisions that broadly disclaim all liability for Defendant. Three provisions, contained at Paragraphs 35-37 of Plaintiffs' Complaints (collectively "Provision 1"), disclaim liability for direct, indirect, and any other damages arising from the use of the Stores, or any content or products made available through them. ¶¶ 35-37. Provision 1 contains a savings clause that limits Defendant's liability waiver with regard to consequential and incidental damages, but disregards the broad waiver of all other damages. *Id.* Another provision, contained at Paragraph 41 of Plaintiffs' Complaints ("Provision 2"), disclaims liability for personal injury, and other damages arising out of the use of licensed applications. ¶ 41. Provision 2 contains a savings clause, which states its liability disclaimer may not apply because some unidentified jurisdictions do not allow for the limitation of liability. *Id.* The last three provisions, contained at Paragraphs 45-47 of Plaintiffs' Complaints (collectively "Provision 3"), require consumers to indemnify and hold Defendant harmless for any claims arising out of a consumer's use of the Stores. ¶¶ 45-47. Provision 3 states that the duty to indemnify is only to the extent permitted by law, but does not specify which state laws allow for such a broad indemnification duty. *Id.*

III. LEGAL STANDARD

Defendant seeks dismissal of Plaintiffs' Complaints for lack of standing under Federal Rule of Civil Procedure 12(b)(1) and for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). In order to survive a Rule 12(b)(1) motion to dismiss, a plaintiff must show that he or she "ha[s] 1) suffered an injury in fact, 2) that is fairly traceable to the challenged conduct of the defendant, and 3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). "[A]t the motion to dismiss stage, Article III standing is adequately demonstrated through allegations of 'specific facts plausibly explaining' why the standing requirements are met." *Machlan v.*

Procter & Gamble Co., 77 F. Supp. 3d 954, 959 (N.D. Cal. 2015). In order to survive a Rule 12(b)(6) motion to dismiss, a complaint must "make 'a short and plain statement of the claim showing that the pleader is entitled to relief,'" and "allege 'enough facts to state a claim to relief that is plausible on its face.'" *Id.*. "A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

IV. ARGUMENT

A. Plaintiffs Have Article III Standing

i. Defendant is Judicially Estopped from Contesting the Standing of the *Palomino* Plaintiffs

Defendant removed the *Palomino* case from the Superior Court of California, Santa Clara County, to this Court. As the party invoking federal jurisdiction, Defendant was required to establish the *Palomino* plaintiffs' Article III standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) ("[t]he party invoking federal jurisdiction" bears the burden of establishing an injury-in-fact under Article III); *As You Sow v. Sherwin-Williams Co.*, No. 93-cv-3577, 1993 WL 560086, at *1 (N.D. Cal. Dec. 21, 1993) ("the burden of proving that plaintiff has Article III standing is with the removing defendants"). Having successfully removed *Palomino*, Defendant necessarily established the *Palomino* plaintiffs' Article III standing. Defendant cannot reverse course now and contend the *Palomino* plaintiffs lack Article III standing. *See, e.g.*, *First Intercontinental Bank v. Ahn*, 798 F.3d 1149, 1154 (9th Cir. 2015) ("[J]udicial estoppel, generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.") (internal quotation marks and citation omitted). The Court should deny Defendant's 12(b)(1) argument on this basis alone.

ii. All Plaintiffs have Article III Standing, as *Spokeo* Confirms

Prior to *Spokeo*, TCCWNA plaintiffs had Article III standing. *See Gomes v. Extra Space Storage, Inc.*, No. 13-cv-0929, 2015 WL 1472263, at *6 (D.N.J. Mar. 31, 2015) (rejecting arguments as to lack of Article III standing to assert claims under the TCCWNA); *Feder v. Williams-Sonoma Stores, Inc.*, No. 11-cv-03070, 2011 WL 4499300, at *2 (D.N.J. Sept. 26, 2011) (same). *Spokeo* has not changed that.

In fact, *Spokeo* held that intangible injuries can be concrete, and reaffirmed that statutes can "define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." 136 S. Ct. at 1549; *see also Diamond v. Charles*, 476 U.S. 54, 66 n. 17 (1986) (recognizing that state legislatures have "the power to create new interests, the invasion of which may confer standing. In such a case, the requirements of Art. III may be met"). For instance, "a plaintiff seeking to vindicate a statutorily created private right need not allege actual harm beyond the invasion of that private right." *Spokeo*, 136 S. Ct. at 1553 (Thomas, J. concurring). So long as the statutory duty is owed to the individual, and not the public, a plaintiff has standing when that private duty is violated. *Id.* at 1554.

Federal Election Comm'n v. Akins, 524 U.S. 11 (1998), and *Public Citizen v. Department of Justice*, 491 U.S. 440 (1989), cited by the *Spokeo* majority, and *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), cited by Justice Thomas in his concurring opinion, are instructive. In each of those cases, the statute at issue created an individual right to certain information, and the Court found standing because that individual right to receive information was violated. *See Akins*, 524 U.S. at 21 (holding inability to obtain information Congress decided to make public was injury in fact); *Public Citizen*, 491 U.S. at 449 (holding failure to obtain information subject to disclosure by statute was injury in fact); *Havens*, 455 U.S. 373-74 (holding failure to obtain truthful information as required by statute was injury in fact). These cases make it "well-settled" that statutes "may create a legally cognizable right to information, the deprivation of which constitutes a concrete injury." *Thomas v. FTS USA, LLC*, No. 13-cv-825, 2016 WL 3653878, at *9 (E.D. Va. June 30, 2016).

The TCCWNA protects against a similar type of "informational injury." "[T]he Legislature enacted the TCCWNA to permit consumers to know the full terms and conditions of the offer made to them by a seller or of the consumer contract into which they decide to enter." *Shelton v. Restaurant.com, Inc.*, 70 A.3d 544, 558 (N.J. 2013); *Kent Motor Cars, Inc. v. Reynolds & Reynolds Co.*, 207 N.J. 428, 457 (2011) ("The purpose of the TCCWNA…is to prevent deceptive practices in consumer contracts by prohibiting the use of illegal terms or warranties in consumer contracts. By its terms, it encompasses a wider variety of transactions than do truth-in-lending and truth-in-leasing laws."). In order to achieve that objective, the TCCWNA prohibits businesses from offering to *any* consumer a contract including certain illegal provisions. *See* N.J.S.A. §§ 56:12-15 and 56:12-16. The TCCWNA authorizes *any* consumer presented with a contract containing illegal terms to file suit, and recover actual and/or statutory damages. N.J.S.A. § 56:12-17. Thus, through the TCCWNA, the New Jersey legislature has created a new private right—the right be presented with contracts containing certain terms—and a new private injury—being presented a contract with prohibited terms.

It is undisputed that the Terms and Conditions presented to, and entered into with, Plaintiffs contain certain contractual terms Plaintiffs allege violate the TCCWNA. Plaintiffs allege that the TCCWNA covers the contracts they entered into, and thus, allege that they have a right to receive contracts without terms prohibited by the TCCWNA. Plaintiffs have alleged that they sustained a "real" concrete injury in fact because they received contracts that contained prohibited terms. The invasion of Plaintiffs' right to receive contracts without terms prohibited by the TCCWNA is not hypothetical or uncertain; Plaintiffs' received contracts with terms that are prohibited by the TCCWNA. "While this injury may not have resulted in tangible economic or physical harm that courts often expect, the Supreme Court has made clear an injury need not be tangible to be concrete. Rather, this injury is one that [the New Jersey legislature] has elevated to the status of a legally cognizable injury through the [TCCWNA]." *Mahala A. Church v. Accretive Health, Inc*, --- Fed. Appx. ---, 2016 WL 3611543, at *3 (11th Cir. July 6, 2016) (citing *Spokeo*, 136 S.Ct. 1549) (internal citations omitted). Plaintiffs, accordingly, have suffered injury in fact.

Indeed, just last week, Judge Orrick held, in *Larson v. Trans Union, LLC*, No. 12-cv-05726, --- F.3d ---, 2016 WL 4367253 (N.D. Cal. Aug. 11, 2016), that the plaintiff had a concrete injury arising from violations of the Fair Credit Reporting Act. The plaintiff alleged "more than a 'bare procedural violation,'" as his "claim [was] based on the sort of 'informational injury' that the *Spokeo* Court implicitly recognized in citing *Public Citizen* and *Akins*, and that a number of other cases, from both before *Spokeo* and after, have found sufficient to support Article III standing." 2016 WL 4367253, at *9 (citing cases). As Judge Orrick recognized, *Larson* is one of a number of post-*Spokeo* cases to state, on facts comparable to those here, that plaintiffs have Article III standing for "informational injury." *See, e.g.*, *Church*, 2016 WL 3611543, at *3 ("The invasion of [plaintiff's] right to receive [certain] disclosures [under the Fair Debt Collection Practices Act] is not hypothetical or uncertain; [she] did not receive information to which she alleges she was entitled"); *In re Nickelodeon Consumer Privacy Litig.*, --- F.3d ---, 2016 WL 3513782, at *7 (3d Cir. June 27, 2016) ("Intangible harms that may give rise to standing also include harms that 'may be difficult to prove or measure,' such as unlawful denial of access to information subject to disclosure.") (quoting *Spokeo*, 136 S. Ct. at 1549-50); *Thomas*, 2016 WL 3653878, at *26 (finding Article III standing where plaintiff was "deprived of a clear disclosure stating that [d]efendants sought to procure a consumer report before the report was obtained"); *Lane v. Bayview Loan Servicing, LLC*, No. 15-cv-10446, 2016 WL 3671467, at *4 (N.D. Ill. July 11, 2016) (finding concrete injury and Article III standing where plaintiff "allege[d] that Bayview denied him the right to information due to him under the [Fair Debt Collection Practices Act]").

Defendant's reliance on three cases filed by the same serial plaintiff does not succeed. Def. Br. at 5-7 (discussing *Lee v. Chase Manhattan Bank*, No. 07-cv-04732, 2008 WL 698482 (N.D. Cal. Mar. 14, 2008); *Lee v. Capital One Bank*, No. 07-cv-4599, 2008 WL 648177 (N.D. Cal. Mar. 5, 2008); and *Lee v. American Express Travel Related Services*, No. 07-cv-04765, 2007 WL 4287557 (N.D. Cal. Dec. 6, 2007). Those cases each complained of an arbitration clause that "has not, and may never, come into play," *American Express*, 2007 WL 4287557, at *1, since the plaintiff had not tried to seek arbitration. In contrast, the present case involves a concrete informational injury that has *already been sustained* by each plaintiff. Similarly, *Richter v CC-Palo Alto, Inc.*, No. 14-cv-00750, 2016 WL 1275592 (N.D. Cal. Mar. 31, 2016), which also involved only speculative future claims, is inapposite, since plaintiffs' injuries here have already occurred.

Plaintiffs have alleged a concrete, particularized injury and therefore have Article III standing. Defendant's motion to dismiss should be denied.

iii. Plaintiffs Meet the TCCWNA's Standing Requirement.

Defendant attempts to manufacture a standing requirement under the TCCWNA itself, based on the word "aggrieved." There is no support for that idea. In *Shelton*, the New Jersey Supreme Court analyzed plaintiffs' rights under the TCCWNA only in terms of whether they were "consumers," with no separate analysis of whether they were "aggrieved." 70 A.3d at 550. An "aggrieved consumer" is merely a consumer who has been subjected to a violation of the TCCWNA. Plaintiffs satisfy that test.

Shah v. American Express Co., No. 09-cv-00622, 2009 WL 3234594 (D.N.J. Sept. 30, 2009), does not aid Defendant. That case involved plaintiffs who did not do any business with that defendant. *Id.*, at *2 ("Plaintiffs have failed to provide any evidence that they opened the American Express credit cards in question or paid any of their fees"). For this reason, the court ruled that the plaintiffs were mere aggrieved "prospective consumers," to whom the TCCWNA did not extend. *Id.* at *3. In contrast, Plaintiffs here did extensive business with Defendant. *See* PC, ¶¶ 31-32; SC, ¶ 32. Plaintiffs are unquestionably "aggrieved consumers" under *Shah*, which defined "aggrieved consumer" in terms of those who do business with the defendant, as opposed to those, as in *Shah*, who did not. *See Shah*, 2009 WL 3234594, at *3. Regardless, New Jersey's Appellate Division has ruled, after and apparently contrary to *Shah*, that "both customers and those who received the sales pitch [but did not ultimately do business with the defendant] were allegedly aggrieved by defendants' violation of the TCCWNA [and other statutes]." *Wenger v. Cardio Windows, Inc.*, No. L-4924-07, 2012 WL 280254, at *8 (N.J. Super. Ct. App. Div. Feb. 1, 2012).

Defendant wrongly tries to import into the TCCWNA an actual damages requirement that is not present in the statutory language. Def. Br. at 8 (asserting that the TCCWNA requires "loss or injury…to the individual's personal or pecuniary interests or property rights"). No case has ever construed the TCCWNA to include a requirement of actual damages before a plaintiff can sue. That is because the TCCWNA itself affords recovery for either "a civil penalty of not less than $100.00 *or for actual damages*." N.J.S.A. § 56:12-17 (emphasis added). If actual damages were required in order to sue, the TCCWNA would not provide an alternative civil penalty as a measure of recovery.

Both federal and state decisions, including defendant's own cited case, have made clear that "the TCCWNA provides a remedy even if the plaintiff has not suffered any actual damages." *See, e.g.*, *Barrows v. Chase Manhattan Mtge. Corp.*, 465 F. Supp. 2d 347, 362 (D.N.J. 2006); *Walters v. Dream Cars Nat'l, LLC*, 2016 WL 890783, at *6 (N.J. Super. Ct. Law Div. Mar. 7, 2016) (decision located at Dec. of Christina Guerola, Dkt. No. 28-1, Ex. B). Defendant's unsupported attempt to rewrite the TCCWNA to require actual damages fails.

B. Plaintiffs Have Stated A Claim For Relief

i. The Terms and Conditions Violate Section 15 of the TCCWNA

Section 15 of the TCCWNA states that no seller shall offer to a consumer any contract "which includes any provision that violates any clearly established legal right of a consumer or responsibility of a seller…as established by State or Federal law…." N.J.S.A. § 56:12-15. To state a claim under this

Section, a plaintiff must allege: 1) the plaintiff is a consumer; 2) the defendant is a seller; 3) the defendant offered a consumer contract; and 4) the contract includes a provision that violates any clearly established legal right of the plaintiff or legal responsibility of the defendant. *See Watkins v. DineEquity, Inc.*, 591 Fed. Appx. 132, 135 (3d Cir. 2014). Defendant disputes the fourth element here.

Various contract provisions violate clearly established consumer rights. For example, the New Jersey Legislature, in an Assembly Statement accompanying the passage of the TCCWNA, identified "provisions…[it] considered to 'clearly violate the rights of consumers.'" *McGarvey v. Penske Auto Group, Inc.*, 486 Fed. Appx. 276, 280 (3d Cir. 2012). Among the identified provisions are "those that deceptively claim…a seller…is not responsible for *any* damages caused to a consumer, even when such damages are the result of the seller's…negligence." *See* Assembly Statement, Bill No. A1660, 1981 N.J. Laws, Chapter 454, Assembly No. 1660, page 2 (emphasis added). The New Jersey Supreme Court also has identified contract provisions that violate clearly established consumer rights, and has held that "[it] is *well settled* that to contract in advance to release tort liability resulting from intentional or reckless conduct violates public policy, as does a contract that releases liability from a statutorily-imposed duty[.]" *See Hojnowski v. Vans Skate Park*, 901 A.2d 381, 386-87 (N.J. 2006) (citations omitted) (emphasis added); *Stelluti v. Casapenn Enterprises, LLC*, 1 A.3d 678, 689 (N.J. 2010) (similar).

The Terms and Conditions violate Section 15 of the TCCWNA because Provision 1 violates clearly established consumer rights.[3] Provision 1 waives liability for "*any* direct, indirect, incidental, punitive, special or consequential damages arising from your use of any [Store] or for *any* other claim related in *any* way to your use of the [Stores], including, but not limited to,…*any* loss or damage of *any* kind incurred as a result of the use of any content (or product)." ¶¶ 35-37 (emphasis added). This waiver is so broad that it immunizes Defendant from any liability for practically anything, and is identical to the complete liability waiver the New Jersey Legislature identified as violating the TCCWNA. *See*

[3] Provisions 2 and 3 also violate clearly established consumer rights. Provision 2 precludes liability for personal injury in all circumstances, and Provision 3 requires consumers to indemnify Defendant for any claims related to the use of the Stores, which necessarily would include any claims that result from Defendant's misconduct. ¶¶ 41, 45-47. As more fully explained in this paragraph, the TCCWNA prohibits these liability waivers because they waive liability for Defendant's negligent, intentional, reckless, fraudulent and deceptive conduct. Provisions 2 and 3, however, more properly are analyzed under Section 16 of the TCCWNA because of their applicable savings clauses. For that reason, only Provision 1 is mentioned in this section.

Assembly Statement, page 2; *McGarvey*, 486 Fed. Appx. at 280 ("At the time the [TCCWNA] was first introduced…the listed provisions [in the Assembly Statement], including a consumer's *complete* waiver of damages resulting from a seller's liability, infringed on rights that had been long-recognized in common law.") (emphasis added); *see, e.g., Castro v. Sovran Self Storage, Inc.*, 114 F. Supp. 3d 204, 214-16 (D.N.J. 2015) (stating that exculpatory and indemnity clauses waiving liability for the defendant's "negligence, gross negligence and/or intentional conduct" went to "the heart of the TCCWNA," and finding such clauses in violation of the TCCWNA). Provision 1's liability waiver also precludes New Jersey consumers from recovering punitive damages for egregious conduct under the Punitive Damages Act ("PDA"), N.J.S.A. § 2A:15-5.12, actual and treble damages for unfair, fraudulent and deceptive conduct under The Consumer Fraud Act ("CFA"), N.J.S.A. § 56:8-2, and damages for intentional and reckless conduct under the common law. Defendant cannot contractually release liability for statutory duties imposed under the PDA and CFA, and cannot release liability for intentional and reckless conduct. *See Stelluti*, 1 A.3d at 689; *Hojnowski*, 902 A.2d at 386-87. For these reasons, the Terms and Conditions violate Section 15 of the TCCWNA.

Despite the clear violations of Section 15, Defendant contends the Terms and Conditions do not violate clearly established consumer rights. All of Defendant's arguments are incorrect and unpersuasive.

First, Provision 1's savings clause does not limit its broad and unbounded liability waiver "to the extent permitted by law." Def. Br. at 9. The savings clause states, "Because some states or jurisdictions do not allow the exclusion or the limitation of liability for consequential or incidental damages, in such states or jurisdictions, Apple's liability shall be limited to the extent permitted by law." ¶¶ 35-37. This clause does not mention direct, indirect, punitive or special damages, or any of the other damages or claims waived by Provision 1. Defendant's absolute waiver of direct, indirect, punitive, and any other type of damage or claim remains regardless of whether New Jersey or any other jurisdiction permits Defendant's absolute damage waiver. This would preclude recovery for most, if not all, damages resulting from Defendant's negligent, intentional, reckless, fraudulent or deceptive conduct. The narrow scope of the savings clause does not affect the broad liability waiver contained in Provision 1. Moreover, even if the savings clause was as broad as the liability waiver, it states in a general, non-particularized fashion, that it may be unenforceable in "some states or jurisdictions," without stating whether it is unenforceable in New Jersey—this violates Section 16 of the TCCWNA. *See Shelton*, 70 A.3d at 549; *see also* Section IV.B.ii. *supra*. Accordingly, Provision 1's savings clause is inapplicable, and even if it was, it violates Section 16 of the TCCWNA.

Second, Plaintiffs are not required to plead independent statutory or common law violations to state a claim under the TCCWNA. A TCCWNA violation premised on a provision that purports to deny a consumer his or her legal right to bring suit for certain injuries or damages is cognizable. *See, e.g.*, *Castro*, 114 F. Supp. at 216 ("Because a plaintiff's right to bring a personal injury suit based on premises liability is clearly established, and Defendant's Indemnification and Insurance provisions purport to preclude such a suit in violation of that right, Defendant's motion to dismiss Plaintiff's TCCWNA claim will be denied[.]"); *see also Martinez-Santiago v. Public Storage*, 38 F. Supp. 3d 500, 515 (D.N.J. 2014) ("The New Jersey Supreme Court…observed that one of the wrongs that the TCCWNA sought to address was the inclusion of provisions in consumer contracts that are not enforceable but appear to be so, thereby discouraging consumers from enforcing their rights[.]"). Indeed, the Assembly Statement accompanying the TCCWNA states that a defendant may violate the TCCWNA simply by including illegal liability waivers in a contract. *See* Assembly Statement, page 2. The Court should reject Defendant's attempt to re-write the TCCWNA's statutory language and legislative history.

Finally, Defendant has cited no authority showing that New Jersey courts would uphold the liability waiver contained in Provision 1. This section of Defendant's brief ignores the holdings of *Stelluti*, *Hojnowski*, and the Assembly Statement of the New Jersey legislature, and the cases cited by Defendant concern exculpatory clauses that did not involve a seller attempting to disclaim all possible liability in all possible situations. For instance, one case involved an exculpatory clause in a commercial contract between two businesses, *see Asch Webhosting, Inc. v. Adelphia Bus. Solutions Inv., LLC*, 362 Fed. Appx. 310, 312-13 (3d Cir. 2010), and another involved an exculpatory clause in a contract for the sale of a fire and burglar alarm system, which types of clauses "have generally been upheld…even for 'very negligent or grossly negligent performance,'" *Venditto v. Vivint, Inc.*, No. 14-cv-4357, 2014 WL 57032901, at *10 (D.N.J. Nov. 5, 2014). The remaining case cited by Defendant states that "parties may allocate risk of loss by agreeing to limit their liability as long as the limitation does not violate public policy." *Walters, LLC*, 2016 WL 890783, at *11. Plaintiffs have cited New Jersey Legislative statements and New Jersey Supreme Court decisions demonstrating that Provision 1 violates public policy, and thus, is illegal. The Court should disregard Defendant's argument for all of these reasons.

ii. The Terms And Conditions Violate Section 16 Of The TCCWNA

Section 16 of the TCCWNA states, "No consumer contract, notice or sign shall state that any of its provisions is or may be void, unenforceable or inapplicable in some jurisdictions without specifying which provisions are or are not void, unenforceable or inapplicable within the State of New Jersey[.]" N.J.S.A. § 56:12-16. This Section requires "a contract or notice [to] clearly identify which provisions are void, inapplicable, or unenforceable in New Jersey." *Shelton*, 70 A.3d at 549. "In other words, a contract or notice cannot simply state in a general, nonparticularized fashion that some of the provisions of the contract or notice may be void, inapplicable, or unenforceable in some states." *Id.*

Here, the Terms and Conditions violate Section 16 of the TCCWNA because Provisions 2 and 3 state in a general, non-particularized fashion that their damage waivers and indemnification duties may be unenforceable in some states without stating whether they are enforceable in New Jersey. Provision 2 states, "To the extent not prohibited by law, in no event shall [Defendant] be liable for personal injury…arising out of or related to your use or inability to use the licensed application…some jurisdictions do not allow the limitation of liability…so this limitation may not apply to you." ¶ 41. This is the exact language prohibited by the TCCWNA and the New Jersey Supreme Court in *Shelton*. Provision 3 states, "you agree, to the extent permitted by law, to indemnity and hold Apple…harmless with respect to any claims arising out of your…use of the [Stores]." ¶¶ 45-47. This language implies that the provision "may be invalid in New Jersey by stating [it] operate[s] only to the extent [permitted by law]," but fails to state with particularity whether the broad indemnification duty is valid and enforceable in New Jersey. *Gomes*, 2015 WL 1472263 at *7 (holding provisions with the following language violative of Section 16: "pursuant to the provisions of applicable law"; "Except as required by law"; and "in accordance with the state and local laws governing self-storage facilities"). For these reasons, the Terms and Conditions violated Section 16 of the TCCWNA.

Defendant claims Provisions 2 and 3 were written to conform to New Jersey laws. Def. Br. at 12-13. This claim is without merit given Defendant's admission that it "presents uniform Terms and Conditions to consumers across the United States." Def. Br. at 2. Defendant wrote the Terms and

Conditions to apply in multiple jurisdictions, not just New Jersey. The statements that "some jurisdictions do not allow the limitation of liability for personal injury, or of incidental or consequential damages," ¶ 41, and that "you agree, to the extent permitted by law, to indemnity and hold Apple…harmless with respect to any claims arising out of your…use of the [Stores]," ¶¶ 45-47, are not specific to New Jersey. These statements serve as general, non-particularized warnings that the liability limitation and indemnification duty may be void in some jurisdictions. *Compare Martinez–Santiago*, 38 F. Supp. 3d at 511 (holding provision in violation of Section 16 of the TCCWNA because it referenced the agreement's application in multiple jurisdictions, but failed to address the validity of certain provisions in New Jersey) *with Sauro v. L.A. Fitness Intern., LLC*, No. 12-cv-3682, 2013 WL 978807, at *9 (D.N.J. Feb. 13, 2013) (contract specifically referenced New Jersey and, with respect to indemnity provision, stated that it was "intended to be as broad and inclusive as is permitted by law in the State of New Jersey"); and *Martina v. LA Fitness Intern., LLC*, No. 12-cv-2063, 2012 WL 3822093, at *4 (D.N.J. Sept. 4, 2012) (challenged membership agreement stated, "in no event shall this Agreement require payments or financing or extend for a period that would give rise to a retail installment contract or be greater than that permitted under the laws of the State of New Jersey"). This is precisely what the TCCWNA prohibits. Defendant's failure to specify whether the liability limitation and indemnification duty are void, inapplicable or unenforceable in New Jersey violates the TCCWNA.

C. The TCCWNA Does Not Violate The Dormant Commerce Clause

A state law violates the Dormant Commerce Clause ("DDC") where "the burden [it] impose[s] on [interstate] commerce is clearly excessive in relation to the putative local benefits" of the state law. *E.g.*, *Chinatown Neighborhood Ass'n v. Harris*, 794 F.3d 1136, 1146 (9th Cir. 2015) (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). Courts will not perform this analysis, however, "unless the state statute either discriminates in favor of in-state commerce or imposes a significant burden on interstate commerce." *Id.* (internal quotation marks and citation omitted).

Here, Defendant does not claim that the TCCWNA discriminates in favor of in-state commerce, and defendant falls far short of showing any, let alone a "significant" or "clearly excessive," burden on interstate commerce. *Ades v. Omni Hotels Mgmt. Corp.*, 46 F. Supp. 3d 999, 1016 (N.D. Cal. 2014) (stating that burden is on party claiming Dormant Commerce Clause violation to demonstrate "clearly excessive" burden on interstate commerce compared to local benefits of state statute). As discussed *supra* at page 5, the TCCWNA offers significant, substantive protections to consumers. Consumer protections are "important rights affecting the public interest." *See*, *e.g.*, *MacDonald v. Ford Motor Co.*, 142 F. Supp. 3d 884, 896 (N.D. Cal. 2015). Against these important local benefits, Defendant offers only a minuscule, if not non-existent, burden on interstate commerce that purportedly arises from the TCCWNA. That burden, according to *Defendan*t, *is* that companies must "separately state the applicable law in New Jersey" or face suit for violating the TCCWNA. Def. Br. at 13. That "burden," however, is no burden at all. Adding to a contract provision the phrase "not valid in New Jersey," or something similar, requires almost no effort. *See, e.g.*, *Ades*, 46 F. Supp. 3d at 1215 (denying summary judgment on DDC where it took defendant approximately one hour to add statutorily-complaint notification); *Ferguson v. Friendfinders, Inc.*, 115 Cal. Rptr. 2d 258, 268 (Cal. Ct. App. 2002) (rejecting DDC argument because cost of including statutorily compliant information in email subject line and body was "appreciably zero in terms of time and expense"). Defendant's "relatively mild compliance costs" pale in comparison to, for example, the expense of thousands of dollars per company that was found *not* to "unduly burden interstate commerce" in *Pharm. Research v. County of Alameda*, 967 F. Supp. 2d 1339, 1346 (N.D. Cal. 2013).

All of Defendant's cited cases miss the mark. First, stating whether a website provision applies in New Jersey is a far cry from the burden of "provid[ing] a consumer with a complete dissertation of New Jersey [Personal Injury Protection Automobile Insurance] law," as stated in *Walters*, 2016 WL 890783, at *9. Second, as previously stated, *Sauro*, is unlike this case because the contract at issue there specifically referenced New Jersey. 2013 WL 978807, at *9. Third, more recent cases and scholarly analyses, with a more complete and contemporary understanding of internet marketing, have rejected *Am. Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 167 (S.D.N.Y. 1997) and *Consol. Cigar Corp. v. Reilly*, 218 F.3d 30, 56 (1st Cir. 2000), cited at pages 14 and 15 of Defendant's brief. *See*, *e.g.*, *Ades*, 46 F. Supp. 3d at 1017 n.10 (finding *Reilly* unpersuasive); *Nat'l Fed'n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 961, 964 (N.D. Cal. 2006) (citing other cases and commentators that have rejected *Pataki*); *Ferguson.*, 115 Cal. Rptr. 2d at 264-65 (criticizing *Pataki* and citing other California state court cases to the same effect). Since, as discussed *supra*, the TCCWNA does not in fact threaten the internet, but poses little or no burden on interstate commerce, the Dormant Commerce Clause does not call for invalidating the statute. Finally, while the Connecticut statute at issue in *Healy v. Beer Institute*, had "the undeniable effect of controlling commercial activity occurring wholly outside the boundary of the State," 491 U.S. 324, 337 (1989), the TCCWNA is applied only on behalf of consumers in New Jersey who access Defendant's website, *see Chinatown*, 794 F.3d at 1145-46 (recognizing that "a state may regulate commercial relationships in which at least one party is located in [that state]," and distinguishing *Healy* as a case that (unlike the present case) involved effects on pricing in other states, and recognized that such price-control regimes are "sui generis" and have "limited scope" as precedent) (citation and internal quotation marks omitted). Non-discriminatory laws that are outside the realm of interstate transportation, professional sports leagues, or out-of-state price control regimes have rarely been found to violate the Dormant Commerce Clause. *Id.* at 1146-47 (citing cases).

Additionally, Defendant's proffered horrible—the potential that some other state(s) too might someday pass legislation requiring a statement as to whether the law of such state(s) prohibit a website clause—is pure speculation. Def. Br. at 14. Regardless, it would be no more burdensome to add "void in [State X] and [State Y]" or the like, than it is to say "void in New Jersey," which would satisfy the TCCWNA. The ease of adding such language is demonstrated by the numerous television commercials that state, for example, "NJ & CA add sales tax." *See*, *e.g*., https://www.youtube.com/watch?v=goK_aOu1T0I (advertising for WOW Cup, a non-spill cup for children); https://www.youtube.com/watch?v=IoHMd1yOBfM (advertising for Ped-Egg foot grooming product).

In sum, Defendant does not contend that the TCCWNA is discriminatory, and any effect it has on interstate commerce is vanishingly small. There is no DDC violation here.

V. CONCLUSION

For all of the foregoing reasons, the Court should reject Defendant's arguments and deny its motion to dismiss Plaintiffs' Complaints in full.

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